STATE OF MICHIGAN

COURT OF APPEALS

DALLAS BURTON,

Plaintiff-Appellant,

v

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant-Appellee.

UNPUBLISHED
August 29, 2000

No. 212479
Macomb Circuit Court
LC No. 89-000288-CK

Before: Meter, P.J., and Gribbs and Griffin, JJ.

PER CURIAM.

Plaintiff appeals by right from a judgment in the amount of $92,969.56 rendered in his favor following a jury trial in this controversy arising from defendant's alleged wrongful denial of insurance benefits to plaintiff. We affirm.

I

In August 1984, plaintiff's house in St. Clair Shores was severely damaged when a cement truck owned and operated by an employee of Ace Cement Products and contracted by James Beatty, who had been hired by plaintiff to repair and reinforce the understructure of the dwelling in preparation for the addition of a second story, struck the house and knocked it off its jacks. At the time of the loss, defendant insured the property pursuant to a fire and casualty insurance policy.

In 1989, plaintiff filed the present action against defendant alleging breach of contract/wrongful denial of benefits, unfair trade practices, bad faith, coercion, fraud (in the failure to pay the insurance claims), misrepresentation (of photographs during the appraisal process), and a request for exemplary/extra-contractual damages. In 1991, on the basis of defendant's motion for summary disposition, the trial court dismissed all claims except those alleging fraud and misrepresentation. These remaining claims proceeded to trial before a jury. Following the presentation of plaintiff's proofs, the trial court granted defendant's motion for a directed verdict regarding both claims.

Plaintiff appealed by right to this Court from the directed verdict favorable to defendant on the fraud and misrepresentation claims and from summary disposition granted to defendant on the breach of contract claim. This Court affirmed in part and reversed in part, holding the trial court properly granted a directed verdict on plaintiff's claim that defendant fraudulently failed to pay insurance claims and, further, that two of plaintiff's arguments were abandoned by his failure to cite any authority to support his claims. *Dallas Burton v State Farm Fire & Casualty Co* unpublished opinion per curiam of the Court of Appeals issued 7/21/95 (Docket Nos. 165641; 167737). However, this Court reversed and remanded for trial with regard to plaintiff's remaining claims of breach of contract and misrepresentation of photographs during the appraisal process.[1]

This matter proceeded to a jury trial for the second time and a jury verdict was rendered in favor of plaintiff in the amount of $45,000 on March 9, 1998. On April 24, 1998, the trial court entered a judgment in favor of plaintiff in the amount of $92,969.56, including interest, costs, and attorney fees. The court thereafter denied plaintiff's motion for a new trial. Despite the fact he was the prevailing party, plaintiff now brings the present appeal, raising a myriad of issues. In response to a writ of garnishment issued by plaintiff and a motion for security for appeal, defendant has paid $82,969.56 to plaintiff and an appeal bond in the amount of $10,000 has been posted.

II

Plaintiff first contends the trial court abused its discretion in denying his motion for a new trial. We review a trial court's decision to deny a motion for a new trial for abuse of discretion. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000).

A

There are several facets to plaintiff's argument that the trial court improperly denied his motion for a new trial. First, plaintiff maintains the trial court should have instructed the jury that interest was an element of damages, pursuant to SJI2d 53.04.[2] A review of the record indicates that counsel for both parties and the trial court discussed proposed jury instructions prior to closing arguments. Plaintiff argued he was entitled to pre-filing interest from thirty days after the 1984 proof of loss was submitted through the date the complaint was filed in 1989. The trial court invited counsel to present authority supporting his request, but plaintiff never again raised the issue prior to the trial court's instructions to the jury. Instead, it was the trial court that expressed concern and questioned, after the fact, whether it had instructed the jury regarding interest. Counsel for plaintiff then suggested that the written SJI2d 53.04

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[1] Subsequently, plaintiff filed an application for leave to appeal to the Michigan Supreme Court, which was denied on July 29, 1996. *Burton v State Farm Fire & Casualty Co*, 452 Mich 879; 552 NW2d 171 (1996).

[2] SJI2d 53.04 provides:

> If you decide plaintiff has suffered damages, you should determine when those damages accrued, and add interest from then to ____, the date the complaint was filed.

instruction be given to the jury with the verdict form. The parties agreed to this procedure and it was duly noted on the record that the trial court provided the jury with this instruction.

This issue has not been preserved for appellate review because plaintiff did not object on the record before the jury began deliberations. MCR 2.516(C). In any event, a court may provide the jury with a partial set of written instructions if the parties consent. MCR 2.516(B)(5); *VanBelkum v Ford*, 183 Mich App 272, 274; 454 NW2d 119 (1989). Counsel for plaintiff stipulated that the written instruction be provided to the jury; in fact, he actually suggested this procedure. "It is well settled that error requiring reversal must be that of the trial court and not that to which the appellant contributed by plan or negligence." *Fellows v Superior Products Co*, 201 Mich App 155, 165; 506 NW2d 534 (1993). Plaintiff cannot concede issues during trial and then claim error based on that concession. *In re Forfeiture of US Currency*, 172 Mich App 200, 206; 431 NW2d 437 (1988). Finally, we note the jury indicated on the verdict form that interest was included. Plaintiff's argument in this regard is therefore without merit.

B

Plaintiff next contends the trial court abused its discretion in denying his motion for a new trial because during trial the court erroneously precluded the introduction of evidence and damages in support of his fraud (failure to pay insurance) claim. However, this issue is rendered meritless by the law of the case doctrine:

> Under the law of the case doctrine, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. *Sokel v Nickoli*, 356 Mich 460, 465; 97 NW2d 1 (1959). Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997); see, generally, 5 Am Jur 2d, Appellate Review, § 605, p 300. [*Grievance Administrator v Lopatin*, 462 Mich 235, 261; 612 NW2d 120 (2000) (footnote omitted).]

In denying plaintiff's motion for a new trial on the issue of exclusion of evidence on the fraud claim, the trial court properly noted the fraud claim was disposed of by this Court's prior decision in this matter, in which the directed verdict on plaintiff's claim that defendant fraudulently failed to pay insurance claims was upheld. This Court's reversal pertained only to the dismissal of the breach of contract claim and the misrepresentation claim relative to the appraisal process. This Court denied plaintiff's motion for rehearing in the prior appeal and our Supreme Court denied his application for leave to appeal. Thus, the decision affirming the trial court's grant of a directed verdict in favor of defendant on the fraud claim bound the trial court with respect to that claim on remand; plaintiff's fraud

claim was dismissed and not at issue. *Lopatin, supra*. Consequently, any evidence of the alleged fraud was properly excluded during the retrial of this matter since the evidence was irrelevant to the remaining misrepresentation claim, and the trial court did not abuse its discretion in denying plaintiff's motion for a new trial on this ground.

In a related argument, plaintiff argues he should be granted a new trial because the trial court erred in denying him attorney fees for his fraud claim. For the reasons set forth above, this issue is likewise governed by and rendered without merit by the law of the case doctrine. *Id*. With regard to plaintiff's breach of contract claim, the judgment entered in the present action included an award of attorney fees; thus, we find plaintiff's appellate challenge to be puzzling and without merit.

C

Plaintiff further alleges he is entitled to a new trial because the trial court improperly denied his motion to reinstate the claims of bad faith and unfair trade practices and thus prohibited him from litigating these claims at the second trial. However, as the trial court appropriately realized, plaintiff's failure to appeal the 1991 trial court order dismissing his uniform trade practices and bad faith claims precluded consideration of these claims on remand:

> When a matter is remanded to the trial court by an appellate court, the trial court possesses the authority to take action that is consistent with the appellate court's opinion and order. . . . Res judicata precludes the trial court from considering issues not considered by the appellate court during a prior appeal, if the issues could have been raised on the prior appeal. . . . A trial court cannot do on remand what higher courts could not do on appeal. [*Hadfield v Oakland Co Drain Comm'r*, 218 Mich App 351, 355; 554 NW2d 43 (1996) (citations omitted).]

We therefore conclude the trial court properly declined to submit these claims to the jury on remand. *Id*.; *Lopatin, supra*.

We find the remainder of plaintiff's appellate issues related to the denial of his motion for a new trial to be confusing, bordering on vexatious, and entirely without merit. We therefore conclude the trial court did not abuse its discretion with regard to any of the matters raised on plaintiff's motion for a new trial. *Abke, supra*.

II

Plaintiff next argues the trial court abused its discretion in denying his motion for relief from judgment pursuant to MCR 2.612(C)(1)(e) and (f)[3], requesting reinstatement of his claims of bad faith

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[3] MCR 2.612(C)(1) provides in pertinent part that a court may relieve a party from a final judgment, order or proceeding if:

(continued…)

and unfair trade practices violations. However, we find no clear abuse of the trial court's discretion in this respect. *Henritzy v General Electric Co*, 182 Mich App 1, 7; 451 NW2d 558 (1990).

First, we note plaintiff has offered no authority to support his motion which attempts to revive the dismissed claims. Thus, plaintiff has abandoned this issue and this Court need not address it. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). In any event, we agree with the trial court that the law of the case doctrine controls this issue. *Lopatin*, *supra*; *Hadfield*, *supra*. In his motion, plaintiff was in effect requesting the trial court to reverse this Court's prior decision in this matter. Plaintiff's failure to appeal the 1991 trial court order dismissing his uniform trade practices act and bad faith claims prohibits him from relitigating those issues. *Hadfield*, *supra*. We therefore conclude the trial court did not abuse its discretion in denying plaintiff's motion for relief from judgment when the motion addressed issues previously abandoned on appeal. *Henritzy*, *supra*.

III

Plaintiff next contends the trial court erred in granting defendant's motion for summary disposition on plaintiff's claim of breach of duty to defend and indemnify in the related case brought by James Beatty against plaintiff. We disagree.

On appeal, this Court reviews de novo a trial court's decision regarding a summary disposition motion. *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 324; 559 NW2d 86 (1996). A motion pursuant to MCR 2.116(C)(10) tests the factual basis of a claim. In reviewing such a motion, the test is set forth in *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties. MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

See also *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999).

(…continued)

> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer applicable that the judgment should have prospective application.
>
> (f) Any other reason justifying relief from the operation of the judgment.

The duty of an insurer to defend its insured depends on the allegations in the underlying complaint; the duty to defend will be required as long as the allegations against the insured are even arguably within the policy coverage. *Smorch v Auto Club Group Ins*, 179 Mich App 125, 128; 445 NW2d 192 (1989). An insurer may limit its duties toward its insured by drafting its coverage clause to include only certain events or by specifically excluding certain events through an exclusionary clause. *Group Ins Co v Czopek*, 440 Mich 590, 604; 489 NW2d 444 (1992). "In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor." *Smorch, supra* at 128. However, where the language is clear and unambiguous on its face and does not offend public policy, the courts apply the terms as written. *Czopek*, *supra* at 596.

James Beatty, the building contractor who was repairing plaintiff's home at the time it was damaged by the Ace Cement truck, was not paid after the incident and consequently filed suit against the present plaintiff for breach of the construction contract entered into by plaintiff and Beatty.

Defendant's alleged duty to defend plaintiff in the action brought by Beatty was purportedly premised on the rental dwelling policy of insurance issued to plaintiff by defendant. However, we agree with the trial court's assessment that the relevant contractual language of the insurance policy, Section II – Exclusions –paragraph 2(a), precludes coverage under the present circumstances. That section provides:

> Coverage L - Business Liability, does not apply to:
>
> (a) liability assumed under any unwritten contract or agreement, or by contract or agreement in connection with any business of the insured other than the rental of the insured premises.

As the trial court aptly noted:

> After carefully reviewing the underlying complaint, the Court notes that Beatty has alleged breach of the written construction contract, as well as breach of an implied contract for other services rendered to the property. The Court finds that these claims are excluded under Paragraph 1.e. and/or 2.a. of the policy since any liability would arise under the contracts themselves, rather than from the damage to his property. Additionally, the contracts do not relate to the rental of the property itself.

We agree with the reasoning of the trial court. The rental dwelling policy language precluding coverage for written contracts like the one at issue in the underlying complaint is clear and unambiguous. The construction contract between Beatty and plaintiff involved repair work to a rental unit, not rental of the unit. It was a written construction contract specifically excluded from coverage under the policy at issue. Therefore, defendant had no duty to defend or indemnify plaintiff in the underlying lawsuit and the trial court did not err in granting summary disposition on this issue. Given this conclusion, plaintiff's argument that he is entitled to attorney fees incurred in the defense of the Beatty action is without merit.

IV

Next, plaintiff argues the trial court abused its discretion in granting defendant's motion in limine to exclude evidence of the dismissed claims of unfair trade practices and bad faith. We disagree.

The decision whether to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999). Any error in the admission or exclusion of evidence does not require reversal unless a substantial right of the party is affected. *Id.*; MCR 2.613(A); MRE 103(a).

The law of the case doctrine applied *supra* likewise disposes of this issue. As previously noted in our resolution of plaintiff's first appellate issue, his failure to appeal the 1991 trial court order dismissing his uniform trade practices and bad faith claims prohibits him from now attempting to litigate those claims. *Lopatin*, *supra*; *Hadfield, supra*.

V

Plaintiff also maintains the trial court abused its discretion in excluding evidence of damages, i.e., attorney fees and associated costs, incurred by plaintiff in the suit brought by Beatty. Plaintiff's argument is this regard is redundant. Having found that defendant had no duty to defend plaintiff in the action by Beatty, we conclude plaintiff was not entitled to attorney fees incurred in defending that action. The judgment entered in the present action did include an award of attorney fees. In addition, as previously discussed, the jury was instructed regarding interest as an element of damages; thus, plaintiff's assertion to the contrary is unfounded. Moreover, this Court in its prior opinion affirmed the trial court's directed verdict in favor of defendant on the issue of fraud; elements of damages pertaining to this issue were therefore not at issue on retrial. Finally, contrary to plaintiff's assertion that evidence of his settlement with Ace Cement in a related action should not have been introduced at this trial or allowed as a setoff from defendant's liability, we conclude that the trial court did not abuse its discretion in admitting this evidence because it was relevant to defendant's affirmative defense regarding mitigation of damages. MRE 401.

With regard to plaintiff's remaining evidentiary challenges, upon review of the record we find them to be meritless.

VI

Plaintiff lastly maintains that the trial court erred in quashing the writ of garnishment and abused its discretion in setting aside $10,000 paid in satisfaction of the judgment for an appeal bond. We disagree.

Pursuant to MCR 2.614(A)(1), an execution of a judgment is automatically stayed for twenty-one days:

> [E]xecution may not issue on a judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after its entry. If a motion for new trial, a motion to alter or amend the judgment . . . is filed and served within 21 days after entry of the judgment, execution may not issue on the judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after the entry of the order on the motion, unless otherwise ordered by the court on motion for good cause.

In this matter, the twenty-one day period did not begin to run until this Court entered the order denying plaintiff's motion for new trial and/or additur on May 27, 1998. Until the expiration of that twenty-one day period, plaintiff was precluded by the above court rule from obtaining a writ of garnishment for the judgment amount. Thus, the trial court properly entered an order quashing the writ, which had been issued on May 19, 1998, prior to the expiration of the requisite period. In any event, defendant's timely payment of $82,969.56 to plaintiff and its payment of the remaining $10,000 to the court clerk pursuant to the trial court's order renders this issue moot on appeal.

Moreover, a trial court may require a plaintiff to post security for costs. MCR 2.109(A).[4] The decision to require security is a matter within the sound discretion of the trial court, reviewed by this Court for an abuse of discretion. *Zapalski v Benton*, 178 Mich App 398, 404; 444 NW2d 171 (1989). Security should not be required in the absence of substantial reason therefor; "[t]he assertion of groundless allegations or a tenuous legal theory of liability may provide sufficient reason for ordering security to be posted." *Id*.

In this case, defendant requested that the trial court order plaintiff to post security for costs on appeal, asserting that the appeal was vexatious and without merit. The trial court granted defendant's request for an appeal bond and required that $10,000 of the judgment be deposited for such a purpose. Given this case has been exhaustively litigated in the Michigan court system for the last ten years and has been tried twice, with a favorable result for plaintiff at the conclusion of the second trial, we are unpersuaded by plaintiff's argument that the trial court

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[4] MCR 2.109(A) provides:

> On motion of a party against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court, or, if the claiming party appeals, by the trial and appellate courts. The court shall determine the amount in its discretion. . . .

abused its discretion in ordering that $10,000 of the judgment be held in an interest-bearing account with the circuit court clerk as a bond on appeal.

Affirmed.

/s/ Patrick M. Meter
/s/ Roman S. Gribbs
/s/ Richard Allen Griffin